INTERIOR BOARD OF INDIAN APPEALS

Perry Murdock v. Acting Phoenix Area Director, Bureau of Indian Affairs

22 IBIA 130 (06/18/1992)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

PERRY MURDOCK
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-133-A Decided June 18, 1992

Appeal from a decision denying an application for Indian preference in employment with the Bureau of Indian Affairs.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Secretary of the Interior

   The Board of Indian Appeals has no authority to review acts or decisions of the Secretary of the Interior, except as referred to the Board by the Secretary under 43 CFR 4.330(a)(2).

2. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

   A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

3. Board of Indian Appeals: Jurisdiction--Constitutional Law: Generally

   The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

APPEARANCES: Kent A. Higgins, Esq., Idaho Falls, Idaho, for appellant; William Robert McConkie, Esq., Office of the Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Acting Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Perry Murdock seeks review of a July 22, 1991, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), denying appellant's application for Indian preference in employment. For the reasons discussed below, the Board dismisses this appeal.

Background

Pursuant to the Ute Partition and Termination Act of 1954 (the Act), 25 U.S.C. §§ 677-677aa (1988), appellant's parents were included on a list of mixed-blood Utes, with respect to whom the Federal trust relationship was terminated following publication of a proclamation to that effect in the Federal Register on August 26, 1961, 26 FR 8042. 1/

Appellant applied for employment with the Uintah and Ouray Agency, BIA. He was advised by the Superintendent that he would not be granted Indian preference in employment because of his parents' status as terminated mixed-blood Utes. Appellant appealed to the Area Director, who affirmed the Superintendent's decision on July 22, 1991.

Appellant's appeal from the Area Director's decision was received by the Board on August 26, 1991. Both appellant and the Area Director filed briefs.

Discussion and Conclusions

On appeal, appellant states:

> [Appellant] appeals the denial [of Indian preference status] because the termination of his parents is invalid for three reasons: (a) The Secretary of the Interior failed to perform his duties prerequisite to the termination; (b) the termination took place without notice and hearing, or other elements of Fifth Amendment due process; and (c) the termination was an impermissible racial segregation imposed on the Ute tribal members.

(Appellants' Opening Brief at 1). The remainder of appellant's opening and reply briefs make it apparent that he is not challenging the Area Director's decision denying him Indian preference but, rather, the 1961 termination of his parents. His challenge is based on, among other things, a claim that the Act is unconstitutional.

[1] There are a number of reasons why the Board lacks jurisdiction over this matter. First, the proclamation terminating the Federal trust

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1/ 25 U.S.C. § 677v (1988) provides:

"Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which [sic] supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction."

relationship with appellant's parents was signed by the Secretary of the Interior. The Board has no authority to review acts or decisions of the Secretary, except as referred to the Board by the Secretary under 43 CFR 4.330(a)(2). See, e.g., 43 CFR 4.1(b)(2), 4.331(b). This matter has not been so referred.

[2] Further, even if the termination proclamation had been issued by a BIA official, the Board would still lack jurisdiction here because the appeal is far out of time. The termination of appellant's parents occurred over 30 years ago. Under BIA appeal regulations in effect in 1961, a notice of appeal was required to be received in the office of the official whose decision was being appealed within 20 days after the mailing of that decision. See 25 CFR 2.10(a), 2.22(a) (1966). The Board has frequently held that an untimely notice of appeal from a decision of a BIA official must be dismissed. E.g., Arviso v. Assistant Navajo Area Director, 18 IBIA 118 (1990), and cases cited therein.

[3] Finally, to the extent appellant challenges the constitutionality of the Act, the Board also lacks jurisdiction. As it has stated on a number of occasions, the Board has no authority to declare an act of Congress unconstitutional. E.g., Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990), and cases cited therein.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed as outside the scope of the Board's jurisdiction.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge